

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

**FLOWING WELLS UNIFIED SCHOOL
DISTRICT,**

Appellant/Respondent,

-v-

**L. V., by and through her parents and
legal guardians, B. and R. V.,
Petitioner.**

Docket No. 03F-II03008-ADE

**DECISION AND ORDER OF
ADMINISTRATIVE LAW JUDGE
IN LEVEL II APPEAL**

This is a final administrative appeal brought by Respondent Flowing Wells Unified School District for review of the October 15, 2002 Due Process Hearing Officer's Order enforcing Status Quo, the November 18, 2002 Due Process Hearing Officer's Decision, and the November 21, 2002 Due Process Hearing Officer's Order denying reconsideration of the Order enforcing Status Quo. Respondent Flowing Wells School District filed its appeal of these determinations with the Arizona Department of Education on December 10, 2002.

Pursuant to Arizona Revised Statutes (A.R.S.) §§41-1092.01(E) and 41-1092.02, the Arizona Department of Education ("ADOE") referred this matter, and the Level I record, to the Office of Administrative Hearings for the final Level II administrative appeal review as provided in Arizona Administrative Code (A.A.C.) R7-2-405(J). ADOE completed its filing of the remaining Level I documents in this matter on December 19, 2002.

The law governing these due process proceedings is the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 *et seq.* (as re-authorized and amended in 1997), and its implementing regulations, 34 C.F.R. Part 300, as well as the Arizona Special Education statutes, A.R.S. §§15-761 *et seq.*, and the implementing rules, A.A.C. R7-2-401 through R7-2-408.

Jerri Katzerman, Esq. of the Arizona Center for Disability Law represented the Petitioner ("Student") in the due process proceeding. Denise M. Bainton, Esq. of Deconcini McDonald Yetwin & Lacy PC represented the Respondent Flowing Wells Unified School District ("District" or "Appellant" herein).

1 Student's parents initiated the due process procedure from which this appeal
2 arises by filing the due process request of September 25, 2002. Student filed the due
3 process request with regard to the District's alleged substantive and procedural
4 violations of the IDEA, in failing to implement an existing individualized education
5 program ("IEP") from the previously attended school, resulting in a denial of Student's
6 right to receive a free appropriate public education ("FAPE"), and in presenting a
7 proposed IEP which is not reasonably calculated to provide Student with meaningful
8 educational benefit.

9 On October 15, 2002, Due Process Hearing Officer Elizabeth B. Harmon
10 ("Hearing Officer") issued her Ruling on Petitioner's Motion to Enforce the Status Quo
11 Provision of the IDEA. The Ruling ordered the District to implement the existing IEP to
12 the extent possible, and to include a full day kindergarten, 40 weekly minutes of speech
13 language therapy and retention of a properly qualified American Sign Language
14 ("ASL")/gloss specialist.

15 On November 18, 2002, Hearing Officer issued her Decision and Order
16 ("Decision"), setting forth the three due process issues on page 3 of her Decision. As to
17 issue number 1, the Hearing Officer found that the District had failed to implement
18 Student's September 5, 2001 IEP which resulted in a denial to the Student of FAPE. As
19 to issue number 2, the Hearing Officer found that the District's proposed September 16,
20 2002 IEP was not reasonably calculated to provide Student with FAPE, and ordered the
21 IEP to be rewritten to include a minimum of four certain specific items: full day
22 kindergarten; minimum 40 weekly minutes of speech language therapy; specialized
23 instruction in reading and writing English print using ASL, glossing and graphemes; and,
24 a trained ASL/gloss specialist for that instruction. As to issue number 3, the Hearing
25 Officer found that Student was entitled to compensatory education for additional hours
26 of specialized instruction in ASL/gloss and additional hours of speech language therapy.

27 In the Decision, the Hearing Officer ordered the IEP team to convene to draft the
28 appropriate IEP in accordance with her Decision, and ordered the District to provide
29 teacher training and support to assure the provision of instruction in reading and writing
30 using glossing. Additionally, the Hearing Officer ordered that Student's parents consent

1 to a speech language reevaluation. Finally, the Hearing Officer determined the Student
2 to be the prevailing party.

3 On November 21, 2002, the Hearing Officer issued her Ruling on the District's
4 Motion to Reconsider [the Order enforcing Status Quo] and denied the Respondent's
5 Motion to Reconsider.

6 On December 10, 2002, the District filed its appeal ("Appeal") of these
7 determinations with the Arizona Department of Education. The District's appeal
8 consists of the following points:

- 9 1. That the Hearing Officer's Ruling that the -- -- Elementary School ("--")
10 was the Student's stay-put IEP was wrong as a matter of law.
- 11 2. That the Hearing Officer's conclusion that the District violated procedural
12 requirements by bringing a prepared IEP to the first IEP meeting prior to
13 meeting with the parents was not supported by the evidence and was
14 contrary to law.
- 15 3. That the Hearing Officer's conclusion that the District's proposed IEP was
16 not designed to provide Student with meaningful educational benefit was
17 not supported by the evidence and was contrary to law, and the case law
18 the Hearing Officer relied on can be easily distinguished.
- 19 4. That the Hearing Officer's finding that the District did not explain how it
20 would go about teaching Student was erroneous.
- 21 5. That the Hearing Officer's reliance on Student's demonstration of reading
22 gloss was misplaced and the Hearing Officer's findings regarding that
23 demonstration contained significant errors.
- 24 6. That the Hearing Officer's conclusion that there was "no large body of
25 research" to support glossing was erroneous.
- 26 7. That the Hearing Officer's conclusion that Student be provided with "full
27 day kindergarten" was unsupported.
- 28 8. That the Hearing Officer's conclusion that a speech reevaluation is not
29 legally required was erroneous; and the conclusion that Student had
30 previously had a speech language evaluation was erroneous; and the

order that Student be given speech service until the ordered reevaluation was not supported by the law or evidence.

9. That the District should not be required to provide compensatory services.

The Administrative Law Judge reviewed the extensive record consisting of the hearing record compiled by the Hearing Officer (including the Motions and Responses), the exhibits admitted into the record at Level I hearing, the post-hearing submissions, the four volumes of hearing transcripts, the Decision, the two Rulings, and the appeal brief.

Standard of Review

This is a final administrative hearing appeal. Both federal and state law require that the Level II reviewer "make an independent decision". 20 U.S.C. §1415(g) (1998 Supp.); A.A.C. R7-2-405(21)(b)(v). The Level II reviewer may exercise non-deferential review, except that deference will be given to findings of a hearing officer based on credibility judgments. *Carlisle Area School v. Scott P.*, 62 F.3d 520, 529 (3d Cir. 1995). Deference will be given to the administrative findings of a hearing officer when the findings are well and carefully constructed and determined, as they are in this case. Nevertheless, this appeals tribunal is not bound by a hearing officer's factual or legal conclusions.

Having reviewed and considered the record of the Level I Due Process hearing and the District's Appeal brief, the Administrative Law Judge makes the following Decision and Order affirming the Hearing Officer's Decision from the Level I due process hearing.

FINDINGS

1. The issues presented as stated by the Hearing Officer are determined to be an accurate statement of the issues in the matter, and are both adopted and incorporated into this Decision and Order.

2. The Findings of Fact as stated by the Hearing Officer are determined to be accurate and are both adopted and incorporated into this Decision and Order, with only minor modifications as might be noted below in discussion of the appeal and the record.

DISCUSSION OF APPEAL

3. Appellant District essentially relies on its same Level I arguments with regard to whether the -- IEP is, or is not, Student's current IEP for stay-put purposes. Appellant's arguments fail that -- was not a public agency or not considered to be a public agency under the applicable federal and statutory requirements. The Hearing Officer's determination, that the -- IEP was the stay-put IEP, is appropriate based on 34 C.F.R. Part 300, Appendix A, Question No. 17. A public charter school is a publicly funded school district established by a contract and constitutes a "local education agency" ("LEA") for purposes of the IDEA. A.R.S. §15-101(3). The IDEA defines an LEA to mean a public agency which exercises control or direction over public schools in a political subdivision. 20 U.S.C. §1401(15). LEA includes a charter school. 34 C.F.R. §300.18(b). Therefore, a charter school has the same responsibility as a public school district to abide by the IDEA in the provision of special education and related services. A charter school shall ensure compliance with all federal and state laws relating to the education of children with disabilities in the same manner as a school district. A.R.S. §15-183. A charter school permissively may limit or permit admission of a disabled child on the basis of age. A.R.S. §15-184. The Hearing Officer correctly determined that the existing -- IEP was Student's current IEP.

4. The Hearing Officer's determination that the appropriate stay-put IEP is the -- IEP results in the failure of Appellant's arguments with regard to being required to provide full day kindergarten and speech language therapy. Full day kindergarten and speech language therapy were provided under the -- IEP.

5. The hearing record showed, in the Center for Hearing Impaired Children's ("CHIC") IEP, some speech language assessment in August 2000; perhaps this was not an independent evaluation. Petitioner's Exhibit A. The record also contains undated notations regarding speech evaluation. See Speech Language Pathologist Alt's letter in Petitioner's Exhibit H, which appears to be from March 2002.

6. A reevaluation is appropriate as conditions warrant, or on parental or teacher request, or every three years as necessary. 20 U.S.C. §1414(a)(2). All factors appear to be present in this case, and a speech language reevaluation in these particular circumstances can only be to the benefit of projecting meaningful education for Student.

1 The Level II reviewer determines that reevaluation would have been “legally” required at
2 the three year mark, but that conclusion does not take away from a determined need for
3 reevaluation by the Hearing Officer under the circumstances in this case after hearing
4 all the testimony and reviewing the evidence presented.

5 7. Appellant splits hairs in arguing on the choice of words the Hearing Officer
6 utilized regarding “gloss” research. In the last paragraph of page16, the Hearing
7 Officer’s first sentence states there is “very little published research”, and the fourth
8 sentence states “Overall there is no large body of research...”

9 8. The Hearing Officer’s Decision acknowledged that the District provided
10 multiple witness testimony regarding “strategies” the District would use to teach
11 Student. The Hearing Officer indicated that this information was presented in the
12 context of the parties’ disagreements on whether “glossing” was an appropriate
13 methodology. It is evident from the Hearing Officer’s determinations that she was not
14 convinced, based on the testimony and evidence, that the District had a better
15 methodology or strategy than “gloss”, or had one which would provide a more
16 meaningful educational benefit than “gloss” would, for teaching Student to read English
17 print.

18 9. The Hearing Officer’s determinations and observations from Student’s reading
19 demonstration will not be disturbed. The Level II Reviewer has no independent ability to
20 question the Hearing Officer’s own observations and statements about her own
21 observations.

22 10. The parents clearly requested in their letter dated August 23, 2002, that the -
23 - IEP be implemented for 60 days while they met and determined Student’s IEP for the
24 District. Respondent’s Exhibit 3.

25 11. The District’s Invitation to Parent Conference (to be held on August 27,
26 2002) states the purpose of the meeting was to “Review evaluation results” and
27 “Determine eligibility or continued eligibility for special education placement”.
28 Petitioner’s Exhibit C.

29 12. The Petitioner’s Exhibit C, and C1, documented the District’s August 27,
30 2002 IEP, whether that document was called a proposed IEP or a draft IEP. The
portion of Exhibit C which is the actual IEP has additional writing thereon, in different

1 persons' handwriting. The word "draft" is handwritten on the Exhibit, but it is not
2 typewritten thereon. According to the record, this IEP was first presented to the parents
3 at the August 27, 2002 meeting.

4 13. The Petitioner's Exhibit C1, is the District's recounting of the August 27,
5 2001 meeting. It is also the District's Prior Written Notice that the District was proposing
6 a change in the current IEP. Exhibit C1 states, in pertinent part, that "... [District]
7 proposed a revised IEP for 60 days that was rejected by parents and their advocates.
8 [District] considered her IEP from [--] dated 9/5/01 – 9/5/02 but rejected it. ..."

9 14. Based on the unfolding events, the inescapable conclusion is that, by
10 coming to the August 27, 2002 meeting with either a "proposed" or a "draft" IEP, which
11 did not contain all elements of the existing -- IEP, the District had rejected the -- IEP
12 prior to the August 27, 2002 meeting. The Hearing Officer correctly determined that this
13 series of actions was a violation of IDEA procedural requirements which did not allow
14 the parents to be equal participants in the development of Student's IEP.

15 15. The Hearing Officer correctly determined that, absent all the elements of the
16 -- IEP, the District's proposed September 16, 2002 IEP was not reasonably designed to
17 provide meaningful educational benefit. The District is responsible for providing the
18 Student with special education reasonably calculated to provide meaningful educational
19 benefit, pursuant to its determined appropriate methodology. See *Board of Education v.*
20 *Rowley*, 458 U.S. 176 (1982). In this case, the Hearing Officer determined that the
21 District presented little evidence that the District's proposed methodology was
22 appropriate, and further determined that the -- IEP contained the appropriate
23 methodology reasonably calculated to provided meaningful educational benefit for
24 Student.

25 16. The Hearing Officer correctly determined that compensatory services were
26 required for Student, based on the District's failure to implement the entire current [--]
27 IEP which failure the Hearing Officer had determined resulted in a denial of FAPE to
28 Student.

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CONCLUSIONS

17. Based on the testimony and documentary evidence and the Level II review, the discussed Conclusions of Law as stated by the Due Process Hearing Officer are determined to be well reasoned and appropriate under the applicable law. Those Conclusions of Law are both adopted and incorporated into this Decision and Order.

18. Respondent's Appeal is appropriately denied and Petitioner remains the prevailing party.

ORDER

Based on the foregoing,

IT IS ORDERED the Level I Due Process Hearing Officer's October 15, 2002 Order enforcing Status Quo is Affirmed and the Appellant District's appeal is Denied;

IT IS ORDERED the Level I Due Process Hearing Officer's November 18, 2002 Decision and Order is Affirmed and the Appellant District's appeal is Denied; and,

IT IS ORDERED the Level I Due Process Hearing Officer's November 21, 2002 Order denying reconsideration of the Order enforcing Status Quo is Affirmed and the Appellant District's appeal is Denied.

This Level II Decision and Order of the Administrative Law Judge is the final administrative appeal in the matter, and any party aggrieved by this Level II Decision and Order of the Administrative Law Judge has a right to, and may seek, judicial review. A.A.C. R7-2-405(22).

ORDERED and DATED this 22nd day of January, 2003.

Kay A. Abramsohn
Administrative Law Judge

1 Copy transmitted by certified mail _____
2 this _____ day of January, 2003 to:

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14 Copy transmitted by mail
15 this _____ day of January, 2003 to:

16 Elizabeth B. Harmon, Due Process Hearing Officer
17 P.O. Box 917
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19 Steven Mishlove, Exceptional Student Services
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24 By _____
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